

VIA E-MAIL

February 22, 2019

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Dear Ms. Carr:

This letter constitutes a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(a)(3), and the Federal Advisory Committee Act (“FACA”), 5 U.S.C. app. 2, and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to the Department of Defense (“DOD”).

EPIC seeks records arising from and related to the National Security Commission on Artificial Intelligence (“AI Commission”).¹

FOIA Request

Documents Requested

- (1) All records concerning the creation of the National Security Commission on Artificial Intelligence;
- (2) All records—including but not limited to reports, agendas, meeting minutes, transcripts, working papers, drafts, studies, and notices of proposed meetings scheduled to be published in the Federal Register—arising from or related to the National Security Commission on Artificial Intelligence; and
- (3) The “initial report on the findings and . . . recommendations” of the National Security Commission on Artificial Intelligence, required by section 1051(c)(1) of the National Defense Authorization Act for FY 2019, due on February 9, 2019.

The DOD has an obligation under its FOIA regulations to reroute “misdirected” FOIA requests to the appropriate agency sub-component.² If “responsibility for the requested records rests with

¹ See John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1051, 132 Stat. 1636 (2018) [hereinafter NDAA].

² 32 C.F.R. § 286.7(c).

a non-DoD Federal agency,” the DOD has an obligation to advise EPIC of the proper agency to resubmit the request to.³

Background

The National Security Commission on Artificial Intelligence was created by Congress through the National Defense Authorization Act for Fiscal Year 2019 (“NDAA”).⁴ Section 1051 of the NDAA establishes the AI Commission “to review advances in artificial intelligence, related machine learning developments, and associated technologies.”⁵ The AI Commission is to be funded by “not more than \$10,000,000” taken from “the amounts authorized to be appropriated by [the NDAA] . . . for the Department of Defense[.]”⁶ On December 26, 2018, the Department of Defense made the required transfer of appropriations to fund the AI Commission.⁷

The AI Commission “shall be composed of 15 members” appointed “for the life of the Commission” by the Secretary of Defense, the Secretary of Commerce, and the chairs and ranking members of seven relevant congressional committees.⁸ The “members of the Commission shall be deemed to be Federal employees,”⁹ but “[t]he Commission shall terminate on October 1, 2020.”¹⁰

The AI Commission is charged with “consider[ing] the methods and means necessary to advance the development of artificial intelligence, machine learning, and associated technologies by the United States to comprehensively address the national security and defense needs of the United States.”¹¹ Specifically, the Commission must review:

- (A) The competitiveness of the United States in artificial intelligence, machine learning, and other associated technologies, including matters related to national security, defense, public-private partnerships, and investments.
- (B) Means and methods for the United States to maintain a technological advantage in artificial intelligence, machine learning, and other associated technologies related to national security and defense.

³ *Id.*

⁴ *Id.*

⁵ NDAA § 1051(a)(1).

⁶ NDAA § 1051(d).

⁷ Memorandum from Michele Bail, Dir., Program & Fin. Control, Dep’t of Def., to Asst. Sec. of the Army, Fin. Mgmt. & Comptroller, et al. (Dec. 26, 2018), https://comptroller.defense.gov/Portals/45/Documents/execution/reprogramming/fy2019/letter/19-05_LTR_DoD_Directed_Transfer_Commission_Artificial_Intelligence.pdf.

⁸ The relevant congressional committees are: Senate Committee on Commerce, Science, and Transportation; House Committee on Energy and Commerce; Senate Committee on Armed Services; House Committee on Armed Services; Senate Select Committee on Intelligence; House Permanent Select Committee on Intelligence. NDAA § 1051(a)(4), (6).

⁹ NDAA § 1051(a)(7).

¹⁰ NDAA § 1051(e).

¹¹ NDAA § 1051(b)(1).

- (C) Developments and trends in international cooperation and competitiveness, including foreign investments in artificial intelligence, related machine learning, and computer science fields that are materially related to national security and defense.
- (D) Means by which to foster greater emphasis and investments in basic and advanced research to stimulate private, public, academic and combined initiatives in artificial intelligence, machine learning, and other associated technologies, to the extent that such efforts have application materially related to national security and defense.
- (E) Workforce and education incentives to attract and recruit leading talent in artificial intelligence and machine learning disciplines, including science, technology, engineering, and math programs.
- (F) Risks associated with United States and foreign country advances in military employment of artificial intelligence and machine learning, including international law of armed conflict, international humanitarian law, and escalation dynamics.
- (G) Associated ethical considerations related to artificial intelligence and machine learning as it will be used for future applications related to national security and defense.
- (H) Means to establish data standards, and incentivize the sharing of open training data within related national security and defense data-driven industries.
- (I) Consideration of the evolution of artificial intelligence and appropriate mechanism for managing such technology related to national security and defense.
- (J) Any other matters the Commission deems relevant to the common defense of the Nation.¹²

Within 180 days of the passage of the NDAA—*i.e.*, by February 9, 2019—the AI Commission “shall submit to the President and Congress an initial report on the findings of the Commission and such recommendations that the Commission may have for action by the executive branch and Congress[.]”¹³ The Commission is then required to submit annual “comprehensive report[s] on the [Commission’s] review” by August 13, 2019 and August 13, 2020.¹⁴ Notably, reports submitted by the AI Commission “shall be made public[ly] available, but may include a classified annex.”¹⁵

On January 22, 2019, it was reported that federal officials had finalized the roster of the AI Commission.¹⁶ The Commission will be chaired by Eric Schmidt, former CEO of Google and

¹² NDAA § 1051(b)(2).

¹³ NDAA § 1051(c)(1).

¹⁴ NDAA § 1051(c)(2).

¹⁵ NDAA § 1051(c)(3).

¹⁶ Jack Corrigan, *Former Google Chief to Chair Government Artificial Intelligence Advisory Group*, Nextgov (Jan. 22, 2019), <https://www.nextgov.com/emerging-tech/2019/01/former-google-chief-chair-government-artificial-intelligence-advisory-group/154333/>.

Alphabet, and vice chaired by Robert Work, former Deputy Secretary of Defense.¹⁷ The Commission will also include:

- Andy Jassy, CEO of Amazon Web Services
- Safra Catz, CEO of Oracle
- Chris Darby, CEO of In-Q-Tel
- Jason Matheny, former IARPA director
- Eric Horvitz, director of Microsoft Research Labs
- Mignon Clyburn, Open Society Foundation fellow and former FCC commissioner
- Andrew Moore, head of Google Cloud AI
- Steve Chien, supervisor of the AI Group at Caltech’s Jet Propulsion Lab
- Ken Ford, CEO of the Florida Institute for Human and Machine Cognition
- Jose-Marie Griffiths, president of Dakota State University
- Gilman Louie, partner at Alsop Louie Partners
- William Mark, director of SRI’s Information and Computing Sciences Division
- Katharina McFarland, consultant at Cypress International¹⁸

Request for Expedition

This request warrants expedited processing under the FOIA because there is a “compelling need” for disclosure of the requested records.¹⁹ Specifically, this request is entitled to expedited processing because there is an “urgency to inform the public about an actual or alleged Federal Government activity,” and because the request is “made by a person who is primarily engaged in disseminating information.”²⁰

First, the activities of AI Commission are an “actual . . . Federal Government activity” because the AI Commission is established by statute and is funded through DOD appropriations. The AI Commission is also part of the executive branch, and members of the Commission are deemed federal employees.

It is “urgen[t] to inform the public” about the activities of the AI Commission because the AI Commission’s initial report on its findings and recommendations was due on February 9, 2019. The report must be made publicly available,²¹ yet there is no indication that the report has been published or even submitted to the President and the Congress. Moreover, the AI Commission is led by technologists, executives of major technology firms, and former federal officials, and the Commission is operating at a time when the White House has launched the “American AI Initiative.”²² The AI Commission’s findings, recommendations, and proceedings will therefore have significant influence on AI policymaking by both Congress and the executive branch. The public urgently needs to be informed of the activities of the AI Commission.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 5 U.S.C § 552(a)(6)(E)(v)(II).

²⁰ *Id.*

²¹ NDAA § 1051(c)(3).

²² Exec. Order No. 13,859, 84 Fed. Reg. 3,967 (2019).

Second, EPIC is an organization “primarily engaged in disseminating information.”²³ As the Court explained in *EPIC v. DOD*, “EPIC satisfies the definition of ‘representative of the news media’” entitling it to preferred fee status under FOIA. 241 F. Supp. 2d 5, 15 (D.D.C. 2003). EPIC certifies that it is currently engaging in the same activities the District Court found sufficient for news media fee status in 2003. EPIC conducts research on emerging privacy and civil liberties issues, analyzes and turns this raw material into a distinct work, and distributes that work to a wide audience through EPIC’s website and publications. Every two weeks for the past 25 years, EPIC has published and disseminated its newsletter, the *EPIC Alert*, to the public.²⁴ EPIC’s work is also consistently featured in widely circulated news publications such as Politico, Law 360, Washington Post, New York Times, NPR, Wall Street Journal, The Hill, CBS, and USA Today.²⁵

In submitting this request for expedited processing, we certify this explanation is true and correct to the best of our knowledge and belief.²⁶

Request for “News Media” Fee Status and Fee Waiver

EPIC is a “representative of the news media” for fee classification purposes. *EPIC v. DOD*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003). Based on EPIC’s status as a “news media” requester, EPIC is entitled to receive the requested record with only duplication fees assessed.²⁷

Further, any duplication fees should also be waived because (i) “disclosure of the requested information is in the public interest because it is likely to contribute to the public understanding of the operations or activities of the government” and (ii) “disclosure of the information is not primarily in the commercial interest” of EPIC, the requester.²⁸

(1) Disclosure of the requested information is likely to contribute to the public understanding of the operations or activities of the government.

Disclosure of the requested documents is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii). First, the subject of the request concerns “operations or activities of the federal government.” The AI Commission was established by statute, is funded through DOD appropriations, is required to submit reports and recommendations to guide the federal government in AI policymaking, and is composed of members who are deemed federal government employees.

Second, disclosure of the requested documents would be “meaningfully informative” because the documents will contribute to an increased understanding of government operations and activities. Specifically, disclosure will educate the public about the activities of the AI Commission and the report that the Commission was required to submit to the President and

²³ 5 U.S.C § 552(a)(6)(E)(v)(II).

²⁴ See EPIC, *EPIC Alert*, <https://www.epic.org/alert/>.

²⁵ See EPIC, *EPIC in the News*, https://epic.org/news/epic_in_news.php/.

²⁶ 5 U.S.C. § 552(a)(6)(E)(vi).

²⁷ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

²⁸ 5 U.S.C. § 552(a)(4)(A)(iii).

Congress. The AI Commission has not yet announced that it will allow public participation in its meetings, nor has it solicited public comment concerning any proposed actions or reports. To date, no information has been released about when the AI Commission will convene, what topics it will discuss (or has already discussed), or whether the required February 9, 2019 report was completed and submitted.

Third, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in the subject” because EPIC is a representative of the news media and therefore satisfies this condition. EPIC largely disseminates its work through its online publications and through traditional news media channels.

(2) Disclosure of the information is not primarily in the commercial interest of the requester

The “[d]isclosure of the information is not primarily in the commercial interest” of EPIC.²⁹ EPIC is a registered non-profit organization committed to privacy, open government, and civil liberties.³⁰ EPIC has no commercial interest in the requested records and does not use the information obtained through FOIA for commercial purposes.

The public interest is also greater than any identified commercial interest in disclosure. Again, EPIC is a non-profit organization with no commercial interest in the requested records and has established that there is significant public interest in the records. As a news media requester, EPIC satisfies the public interest standard and is entitled to a full fee waiver.

FACA Request

Documents and Access Requested

EPIC also seeks access to the records, minutes, and meetings of the National Security Commission on Artificial Intelligence pursuant to section 10 of the Federal Advisory Committee Act. Specifically, EPIC seeks:

- (1) Copies of all “records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by” the National Security Commission on Artificial Intelligence or any subcomponent thereof;
- (2) A copy of the “initial report on the findings and . . . recommendations” of the National Security Commission on Artificial Intelligence required by section 1051(c)(1) of the National Defense Authorization Act for FY 2019; and
- (3) Access to, and advance Federal Register notice of, all meetings of the National Security Commission on Artificial Intelligence and any subcomponent thereof.

²⁹ 5 U.S.C. § 552(a)(4)(A)(iii).

³⁰ *About EPIC*, EPIC.org, <http://epic.org/epic/about.html>.

The AI Commission is subject to the FACA because it is an advisory committee established by statute.³¹ The FACA applies to “any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof” that is “established by statute . . . in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government[.]”³² The AI Commission is a committee established by Congress through the NDAA, and it is required to provide advice to both the President and Congress.

The FACA requires advisory committees to (1) publish their records in a central location; (2) hold their meetings in public; and (3) keep and publish detailed meeting minutes.³³ This means that the Commission’s work must be conducted in the open, and records related to its meetings and proceedings must be proactively disclosed to the public. A committee or agency “may not require members of the public or other interested parties to file requests for non-exempt advisory committee records under the request and review process established by section 552(a) of FOIA.”³⁴

Conclusion

Thank you for your consideration of this request. We anticipate your determination on our request within ten calendar days.³⁵ For questions regarding this request, please contact John Davisson at 202-483-1140 x120 or FOIA@epic.org.

Respectfully submitted,

/s John Davisson
John Davisson
EPIC Counsel

/s Enid Zhou
Enid Zhou
EPIC Open Government Counsel

³¹ Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. 2) [hereinafter FACA].

³² FACA § 3.

³³ FACA § 10(a)–(c).

³⁴ 41 C.F.R. § 102-3.170; *see also Food Chem. News v. HHS*, 980 F.2d 1468, 1469 (D.C. Cir. 1992).

³⁵ 5 U.S.C. § 552(a)(6)(E)(ii)(I).